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FEBRUARY 23. 1781.

(22)

A N S W E R S

F O R

THOMAS TRAILL, Merchant in Kirkwall;

T O T H E

PETITION of ROBERT BAIKIE, Esquire, of Tankerness.

THE object of the petition now to be answered is abundantly evident. The petitioner, satisfied that all the objections made by him to the respondent's enrolment have been justly over-ruled by your Lordships in point of *law*, seems willing, by bold averments in point of *fact*, and as bold offers to prove those averments, to take off, as far as possible, the effect which your Lordships judgment in this and other complaints at the petitioner's instance must necessarily have on the determination of the merits of his election for Orkney in another place. The respondent however is hopeful, that, notwithstanding all the pains the petitioner has taken to perplex this cause, it will not be difficult to satisfy your Lordships, that, though the petitioner may have so far gained his object by the petition's being ordered to be seen, it must fall to be refused now that its merits are considered.

The object of the petition is to make your Lordships believe, that the petitioner is able to prove, that the respondent was not and could not be in possession of a part of the lands upon which he claims to be enrolled.

Before proceeding particularly to consider the particular averments

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ments made by the petitioner, and the evidence by which he offers to support them, the respondent begs leave to submit to your Lordships, first, a few words on the competency of the proof demanded, and then his apprehension of the nature of the facts necessary to be proved, in order to establish the petitioner's averments.

First, then, the respondent submits, that a freeholder's possession of the lands on which he claims to be inrolled cannot competently be disproved by parole evidence, but, if denied by any of the freeholders, can only be investigated by administering to the claimant the oath of trust and possession.

The law, in order to entitle any person to vote, has required that he shall have right to and be in possession of either a forty shilling land of old extent, or L.400 Scots valued rent, holding of the King or Prince. Of a claimant's *right* to the lands on which he claims to be inrolled, the law has required no other evidence than the production of proper titles, a charter, and seisin; accordingly when such are *ex facie* regular and complete, the freeholders are not entitled to dispute the claimant's right to be inrolled, not even if they could instruct in the clearest manner, that the claimant's right to the lands was good for nothing, as (for example) flowing from one who had no right to the lands, nor would it even be competent for the freeholders to combat the claimant's right by producing or proving a preferable title in another person to the same lands.

The wisdom of the law in this respect is obvious; for allowing investigations of this sort would be altogether inconsistent with the nature of a court of freeholders, before whom tedious discussions of every freeholder's title would be impracticable.

On the very same principles the law has wisely prevented the fact of *possession* from being made the subject of investigation by proof before the freeholders. Allowing a person's right to lands to be made the subject of discussion before a meeting of country gentlemen, whether on matter of title or possession, would involve the manifest absurdity of making them a court of justice to determine on land rights, the most important branch of the law of Scotland. The legislature therefore has very properly devised an oath called the oath of trust and possession, for discovering whether the claimant is truly in possession of his lands or not; and the respondent does humbly contend



contend, that putting this oath to the claimant is the only competent mean of proof as to the claimant's possession.

Notwithstanding the many learned arguments on this point contained in the petition, the respondent does not think it necessary to enter deeply into the question, because artificial reasoning can never be opposed to the direct enactment of statute, and the act 7th of George II. cap. 16. which obliges the claimant to swear, that the lands on which he claims are actually in his possession, and do really and truly belong to him, does *virtually* though not *expressly* exclude all other proof of possession.

That the respondent is well founded in this proposition seems to be clear from various judgments of the House of Lords, in cases where the freeholders, not content with putting this oath to claimants in its proper and simple form, thought proper to examine them more strictly on the nature and mode of their possession, on pretence of disproving their actual possession of the lands on which they claimed. Thus, in the case of David Wallace in 1768 from the county of Forfar, your Lordships found the freeholders entitled to put a variety of questions to Mr Wallace in the course of administering to him the oath of trust and possession, which questions were devised for the purpose of discovering that Mr Wallace had not actual possession of the lands in his titles: One of these questions in particular was directly to this purpose, being whether he received any revenue or profit of any kind from the lands, which was, in other words, whether he was in possession to a particular effect. The House of Lords however were of opinion that the fact of possession could only be determined by the general oath of a freeholder, in terms of the act 7th of George II. and they therefore reversed your Lordships judgment. Similar judgments of this Court in other late cases, particularly in that of Mr Ross of Inverhaully, were also reversed by the House of Lords on the same principles.

On the authority of these decisions therefore the respondent contends, that the oath of trust and possession is the only legal method of investigating the fact of possession; and he thinks it would be not a little extraordinary, if it should be found, that though the freeholders are not entitled, in putting the oath of possession, to go a jot beyond the words of the oath, they should yet be entitled to force every claimant into a tedious and expensive proof of possession.

The respondent shall only farther observe on this point, that even supposing it had been competent before the freeholders to have
offered

offered a proof that other persons were in possession of the lands claimed on by the respondent, still, even in this view of the law, the present demand of a proof is altogether incompetent. Before the freeholders the present objection was not moved, and the respondent was refused to be inrolled on objections which your Lordships have found groundless. He voted under protest, and in the protest declared himself ready and willing to *take all the oaths required by law* to entitle him to vote, and required the freeholders to put to him the said oaths accordingly; he must therefore be considered as in the same situation as if he *had taken* the oath of possession, in which case it will certainly not be said that the proof now offered would have been competent.

Your Lordships have found that the freeholders did wrong in sustaining the objections to his inrolment. If therefore your Lordships shall find the present proof competent, this most extraordinary consequence will follow, that the freeholders will gain an advantage by having pronounced an iniquitous judgment; for had they over-ruled the objections made to the respondent, he would have been entitled to have established the fact of possession, by taking the oath appointed by law, whereas by rejecting him they have kept it in their power to harass him in this Court in the manner they are now doing.

To conclude on the point of competency, your Lordships are entreated to attend to the consequence of allowing the present proof. The game played by majorities of freeholders in contested elections has of late been, to keep off all claimants not in their interest, right or wrong, and, at all events, to secure the return in favour of their own candidate. Having got this, the next object is to protract the dependence of the complaints in this Court as long as possible, at least till the determination of the contested election shall be over in the House of Commons. This manœuvre it has ever been an object with your Lordships to prevent; but, if the petitioner shall prevail in his present plea, it will be impossible ever to prevent it in another case; for the majority of freeholders will have nothing to do but to refuse to inroll every claimant in the opposite interest on some trivial objection or other, but without founding at all on want of possession. The injured freeholders complain to this Court; your Lordships are satisfied that the objections were trivial, and that the freeholders did wrong in refusing to inroll them; but, when your Lordships are just about to do

do them justice, by ordering them to be added to the roll, the other party, for the first time, alledge, that the complainers are not in possession of such and such lands in their titles, and that these particular lands are in possession of such and such other persons; that these facts cannot indeed be verified *immediately*; but that, if a proof is allowed, they will establish them. If your Lordships grant this proof, the sole object is obtained; for, before a proof can be taken, the trial is over in the committee, and it is all one to the objectors whether the averments were true or false.

This view of the matter is submitted as well worth your Lordships serious consideration; for if you shall go into Mr Baikie's demand, it is impossible to figure any case in which the same game may not be played.

The respondent shall now proceed to offer your Lordships a few observations on what he apprehends must be the nature and extent of the proof in the present case, if your Lordships shall find it competent.

1st, Then, the respondent apprehends that it will be absolutely necessary for the petitioner to prove, not only that other persons are in possession of lands of the same name and description with those contained in the respondent's titles, but that they are in possession of the *identical* lands. Your Lordships have had occasion to see how very easy it is in this county of Orkney, from a variety of lands being described from the township in which they lie, to confound with each other parcels of land totally distinct and separate. Of this your Lordships have had several instances in other complaints by Mr Baikie, where those attempts to confound different lands were explained and confuted to your Lordships satisfaction.

2^{dly}, It is not enough for the petitioner to offer to prove that other persons are *in possession* even of the identical lands contained in the respondent's titles, he must also show that these persons have a *title* for their possession, because otherwise it is perfectly clear that their possession must in law be held to be the possession of the respondent, who has produced a clear and complete feudal title in his person to every parcel of lands contained in his claim of enrolment. Although therefore the petitioner could bring the clearest proof that any one of these parcels is truly possessed by another person, it would not be sufficient, unless he shows that that possession is in consequence of a legal title. If such person possess as

a vassal or tenant. This is the possession of the respondent. If he possess on bare tolerance, or *vi, clam, or precario*, it is the same thing; for possession without a title, in whatever person it may be, is not in the eye of law the possession of that person, but of him in whom the feudal right to the subject is vested by proper legal titles.

3dly, Supposing the petitioner were able to prove that certain parcels of the lands contained in the respondent's titles were not only possessed by others, but that those others have truly a right of property therein, constituted by proper titles, yet still it would not support the objection to the respondent's inrolment, unless it could be shown that his *valuation* applies to those *particular lands*, it being perfectly clear that there is no necessity whatever for the respondent's being in possession of *every* parcel of lands which his title may contain. It is sufficient that he is in possession of such lands therein contained as have any part of his valuation corresponding thereto. The law does not require that a claimant should be in possession of all the lands to which he may have a title, but that he should be in possession of lands of the necessary valuation.

Having submitted these general observations on the nature of the proof the respondent apprehends the petitioner ought to offer in support of his objections, he shall now proceed to consider the averments he has made, and the proof which he has offered, and to show that they are altogether irrelevant.

The first parcel of lands which the petitioner alleges the respondent is not in possession of, though contained in his titles, are the lands of *Paplay*; and with regard to them the petitioner shapes his averment thus: That a part of these lands of *Paplay* did belong to Stewart of Burray (whose whole property in this island, it is not disputed, came to the Earl of Galloway, and from him to Sir Lawrence Dundas); but that Sir Lawrence never had any proper right to, or at least never was in possession of any part of the lands of *Paplay*, which belonged to Stewart of Burray; and that he has no possession at all in *Paplay*, except a penny land acquired in 1770 from one Gunn, which never was part of the estate of Burray, and which is not conveyed to the respondent: That the lands of *Paplay* consist of nine penny lands, and that the proprietors of these nine penny lands are as follows:

Penny

	Penny.	Farth.
Gruthay's heirs, - - - - -	3	0 $\frac{1}{2}$
Elfness's heirs, - - - - -	2	0
John Heddle, - - - - -	1	2 $\frac{1}{2}$
Mr James Weir, for the glebe, - - - - -	1	0 $\frac{1}{2}$
Alexander Stewart, - - - - -	0	1
Sir Lawrence Dundas in right of William Gurd, 1	1	0
	9	0

From the above state, which the petitioner offers to prove by the oath of John Heddle, one of the above proprietors, and an agent of his own, the petitioner concludes, that, as the whole lands of Paplay are thus accounted for, Sir Lawrence Dundas, and consequently the respondent his disponsee, cannot possibly be in possession of any of the lands of Paplay.

To all this an obvious answer arises from applying the above observations. For, first, as the respondent's titles contain, not the lands of Paplay *in general*, but only *certain lands* in Paplay, the possession of the above persons of lands also in Paplay can never disprove the respondent's possession of those lands in Paplay to which he has right by his titles: For although the petitioner is pleased to call the lands in Paplay a nine penny land, and to state possession by different persons to that amount, yet he has produced or condescended on nothing to show the extent of these lands in Paplay, or that there may not be many other lands in Paplay; and, what shows the loose and random manner in which the petitioner makes his averments, he has not been able to point out to your Lordships which of the alledged proprietors in his list are in possession of the special lands in the respondent's titles.

Your Lordships will observe, that these lands are particularly described in the respondent's titles, not only by the *pennies* and *meils* of which they consist, but by the names of the persons from whom they were derived by the family of Burray; and some of the lands have even distinct names, as Hallbrain, Hilbank, &c. Now it is submitted to your Lordships whether it is reasonable to believe that the petitioner has any good authority for the averments he makes, when he is not able to say that any one of the parcels of land so described is possessed by any one of the persons mentioned in his list. Were he, for example, able to aver that Gruthay's heirs,

heirs, Elfsnes's heirs, or John Heddle, were in possession of the two meils malt meiling udal land in Paplay, with the house called Hal-brain, &c. or any other particular tenement in the respondent's titles, his averment, though in other respects irrelevant, as shall afterwards be shown, would at least have been pointed; but is it possible that your Lordships can for a moment listen to so vague an averment as this, that the lands in the respondent's titles are actually possessed by five different persons, while the petitioner is not able to show which of these persons possess any particular tenement contained therein? and it is not a little remarkable, that not one of the persons condescended on have a possession ascribed to them that, on a calculation of the meils, &c. of which it consists, will apply to one, more, or all the tenements in the respondent's titles.

But farther, supposing the petitioner had condescended ever so pointedly, that any part of the lands in Paplay, contained in the respondent's titles, are possessed by another, even this averment would have been totally irrelevant, for he condescends on bare *possession* only. The lands which he ascribes to the persons contained in his list, either are or are not the lands in the respondent's titles. If they are not, there is an end of the question. If they are; then, as no title is condescended upon under which any of those persons possess them, *their* possession would fall to be held to be the possession of *the respondent*, it being perfectly clear in law, as has been stated above, that where a man possesses without any title, he may possess *naturally*, but the person having the feudal right to the lands possesses *civilly* through him. Giving therefore the petitioner's averments their full force, they come only to this, that the respondent is not in the *natural* possession of his lands, which is nothing at all to the purpose, as he must be held to be *civilly* in possession by those persons whom the petitioner condescends upon, whose possession is his, whether they hold it as vassals, tenants, or by tolerance; or even, *vi, clam*, or *precario*, in one of which situations they must be held to be, as no title in their persons is so much as alledged.

But, *3tio*, Supposing, for argument's sake, that the petitioner had not only *alledged* but *proved*, that the respondent had neither property in nor possession of the lands in question, even this would not avail him; for if these lands do not belong to the respondent, then his valuation does not apply to them, and the only consequence is, that

that he has in his titles not only the lands to which his valuation applies, and which are sufficient to give him a qualification, but *other* lands besides, a circumstance which surely could not hurt the respondent's title to be inrolled.

Your Lordships will remember, that the lands in the island of South Ronaldsay, contained in the respondent's titles, stand valued in the county books in two different parcels, viz. a number of lands, described by the names of different persons, valued in whole at L. 333 : 11 : 10 $\frac{1}{2}$ Scots, and certain other lands that belonged to Alexander Pitcairn, dean of Orkney, valued at L. 55 : 4 : 2 $\frac{1}{2}$. All of these lands were acquired from the family of Burray by the family of Galloway, and from them came by purchase to Sir Lawrence Dundas. If therefore the family of Burray had right to these lands in Paplay, which are to be found in the conveyance from them, and in all the subsequent titles, then the respondent must have the very same right. If he has no right, of consequence the family of Burray had none, and these lands make no part of the respondent's valuation; for your Lordships will observe, that from beginning to end of the decret of division, there is no mention made *nominatim* of any lands in Paplay, and the valuation applies only to the lands in South Ronaldsay therein described that belonged to Stewart of Burray. Supposing, therefore, the petitioner should be able to satisfy your Lordships, that the respondent has no right to these lands in Paplay, nor is in possession of them, still it would not appear that he has not right to and possession of all the lands in his titles to which his valuation applies, which is all that is necessary.

The respondent has been very full on this article, because every thing that is here said can in a very few words be applied to the petitioner's other averments. He shall only farther observe, that the petitioner, in his duplies, threw out an averment with regard to these lands of Paplay, which showed the narrow ground on which he is now proceeding. This particular averment he has since dropt as inconsistent with the wider ground he is now taking. The respondent, however, must bring it under your Lordships view. The petitioner there alledged, that one penny half farthing land in Paplay did belong to the Burray estate, but that it was excambed with the minister for his glebe, and has been possessed by him ever since. How this fact stands, the respondent is altogether ignorant; but taking it as stated by the petitioner himself, it will explain the puzzle he is now endeavouring to create,

and defeat the whole of his averment ; for, as it is not pretended that any *disposition* of these lands was given by the family of Bur-ray, an excambion of *possession* only is alledged, the minister's possession of these lands therefore, were it admitted, would be a possession by *tolerance* merely, and consequently his possession would be the possession of the petitioner himself ; and this circumstance, as the petitioner has not condescended more fully, your Lordships will certainly consider as the ground-work upon which the petitioner has reared up the whole of the above averments.

The next parcel of lands on which the petitioner has condescended, is the lands of Howls, which are contained in the respondent's titles. The petitioner says, that these lands belong to Alexander Stewart of Massater, and that Mr Stewart is in possession of them.

To this averment it is sufficient to answer, as in the former case, that the respondent has not right to the *whole* lands of Howls, but to sundry parcels of land of that name in the town of South Widewall, so that there is nothing at all impossible that Alexander Stewart of Massater may be in possession of lands of the same name lying in the same town, different from those conveyed to the respondent, and indeed the petitioner's averment is no way inconsistent with this supposition.

But at any rate your Lordships will observe, that the lands of Howls are not specially mentioned in the article of valuation ; they either therefore have no part of the valuation applying to them, or if they have, it must be under the description of some of the lands in Widewall contained in the article of valuation. If the last of these be the case, then the respondent possesses them under the lands of Widewall conveyed to him : If not then these lands of Howls have no part of the valuation, and it is no matter if the respondent had neither property nor possession therein.

The only other lands condescended on are the lands of Cleat. And here the petitioner proceeds as he did with regard to the lands of Paplay : He tells your Lordships, that the lands of Cleats are a two penny land, and the lands of Cleat a four penny land ; and he gives a list of the proprietors by whom he says they are possessed ; and in particular he assigns to Sir Lawrence Dundas only 22 meils 1 setteen, whereas he says that Sir Lawrence has conveyed to the respondent 22 meils 4 setteens, and to Mr Innes, another claimant, 21 meils 4 setteens 12 merks, and consequently that Sir
Lawrence

Lawrence has disposed double the quantity of lands in Clets and Cleat that he has right to.

All these averments, like the others, the petitioner proposes to prove by parole evidence of his doer, Mr Heddle, who he says is now in Edinburgh; though the fact is, that he left it the day before the petition was given in, and it is believed is now gone to London.

To all this it might have been sufficient to answer, that, as Mr Innes and the respondent are exactly *in pari casu* as to this objection, your Lordships having ultimately sustained Mr Innes's right to be inrolled, makes it impossible that you can consistently pronounce a contrary judgment with regard to the respondent's. The averment however in itself is but a feeble attempt to perplex a very clear matter. The fact is, that there are in Sir Lawrence's titles 22 meils 4 setteens in Clets and Cleat, which came to the family of Burray from several proprietors; and there are also 21 meils 4 setteens and 12 merks in Clets and Cleat, derived from Halcro of Halcro, which belonged to him at the time of the original valuation of this stewarty. The first of these parcels Sir Lawrence conveyed to the respondent, the last he conveyed to Mr Innes; and it is by wilfully confounding these two parcels together that the petitioner has been able to create the appearance of an objection, which the moment the fact is explained flies off.

It shall only be farther observed, that were the petitioner even able to show that Sir Lawrence Dundas had conveyed to the petitioner a parcel of lands in Clets and Cleat that do not belong to him, it would not affect the present question, for certainly Sir Lawrence has all the lands in South Ronaldsay, that belonged to the family of Burray, and consequently the whole valuation belonging to these lands. Had he conveyed therefore to the respondents fewer lands in Clets and Cleat than he had right to, it might have been said that the respondent had not got all the lands which his valuation applied, but certainly it would not have hurt his qualification if Sir Lawrence had conveyed to him all the lands in Orkney. It will also be particularly observed, that in the article of valuation the name of Clets or Cleat never once occurs; so that denying any part of them to belong to the respondent, and to be possessed by him under some of the other lands therein mentioned, is in effect denying them to be a part of his valuation, and consequently admitting

mitting it to be not material whether he is in possession of them or not.

It may be added, that though the petitioner avers that the rest of the lands of Clets and Cleat, which he says are possessed by Gru-thay's heirs and the other persons condescended on, though contained in the pursuer's titles, are the property of those persons, yet he does not condescend on the shadow of a title in any one of them. Supposing therefore it were necessary for the respondent to show, that he had possession of all the lands of Clets and Cleat contained in his titles, and it were proved that those persons were in possession of certain parts of these lands, as the lands are contained in *his titles*, *their* possession on the grounds shown above would be in the eye of law the possession of the respondent.

On the whole, the respondent submits, not only that the proposed investigation into his possession is incompetent, but that, were it otherwise the averments made are altogether irrelevant, as admitting them in their fullest force, and holding every thing proved that is alledged, still he would be in the eye of the law in possession of every parcel of lands to which the valuation applies on which he claimed to be inrolled. And so standing the case, he cannot entertain a doubt of your Lordships refusing the petition and adhering to your former interlocutor.

In respect whereof, &c.

HENRY ERSKINE.



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